

CHAPTER VII

EMPLOYMENT

Section 11. Sex-BFOQ

C. The Law: Sources of the Legal Standards for Sex - BFOQ

1. Statute and Regulations

FEHA (Government Code) Sections 12940 and 12945.5

Commission Regulations Sections 7286.7(a), 7290.6, 7290.8.

2. Precedential Decisions

DFEP v. Los Angeles County Probation Department (Palaski) FEHC Dec. No. 78-06. Sex (female) and race (Caucasian) - denial of transfer as a deputy probation officer to male juvenile camp. Male BFOQ defense rejected because privacy (nudity) concerns could be accommodated with minor physical alterations.

DFEP v. Merced County Sheriff's Department (Yip and Miller) FEHC Dec. No. 79-13. Sex (female) - failure to hire as correctional officers in men's section of the jail. Requirements of penal code and male BFOQ defenses rejected because privacy (nudity) concerns could be accommodated by work assignment adjustments and minor facility alterations.

DFEH v. Alameda County, Sheriff's Department (Caulfield) FEHC Dec. No. 81-13. Sex (female) and race (Black) - failure to hire as cook. Legal standard for male BFOQ defense based on security and personal privacy concerns; obligation to reasonably accommodate.

DFEH v. Hoag Memorial Hospital Presbyterian (Braden) FEHC Dec. No. 85-10. Sex (male) - denied assignment as a nurse's aide in the postpartum unit. FEHC accepted BFOQ privacy defense; inability to accommodate conflict between privacy concerns and equal employment opportunity.

DFEH v. Globe Battery, A Division of Johnson Control (Foster) FEHC Dec. No. 87-19. Sex (female) - failure to hire (C.O.S. loader, lead battery production job). Fetal Protection Program prohibited hiring women of childbearing age. "Potential risk" defense not applicable to fetus; business necessity defense only available in cases involving facially neutral policies.

DFEH v. Children's Hospital and Health Center (Gilman) FEHC Dec. No. 27-24. Sex (male) - failure to hire (physician in a child sexual abuse program). BFOQ issue undecided because Respondent prevailed on jurisdictional challenge that Complainant was an independent contractor.

DFEH v. Bohemian Club (Lewis) FEHC Dec. No. 88-01 [Reissue of FEHC Dec. No. 81-19]. Sex (female) - pattern and practice refusal to hire, transfer, and promote in a male-only club. Definition of BFOQ as

limited to primary sexual characteristics; legal standard for general sex-BFOQ defense.

3. Court Decisions on Commission Cases

Alameda County v. Fair Employment and Housing Commission (1984) 153 Cal.App.3d 499; decision affirmed.

Bohemian Club v. Fair Employment and Housing Commission (1986) 187 Cal.App.3d 1. Decision affirmed; review denied.

[Globe Battery] Johnson Controls, Inc. v. Fair Employment and Housing Commission (1990) Cal.App.3d 517. Affirmed FEHC Dec. No. 87-19; California Supreme Court denied review.

4. Non-Commission Cases

"Sterility" BFOQ

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW et al. v. Johnson Controls, Inc. 111 S.Ct. 2238, 114 L.Ed. 2d 480, 1991. United States Supreme Court held that Title VII prohibits employers from enforcing sex-specific fetal protection policies (the employer excluded all fertile women from jobs involving actual or potential lead exposure exceeding the OSHA standard). The Court rejected the lower court's application of the business necessity defense because this defense is only available where policies are facially neutral. The employer failed to establish a BFOQ of female sterility.

"Inability to Perform" BFOQ

Weeks v. Southern Bell Telephone and Telegraph Company (5th Cir. 1969) 408 F.2d 233. Females precluded from holding jobs that required lifting over thirty pounds; assumption of inability to perform (switchman position). Court held that it is the employer's burden to show that "all or substantially all" women could not safely and efficiently perform the job.

Rosenfeld v. Southern Pacific Company (9th Cir. 1971) 444 F.2d 1219 1225. Employer excluded females from certain positions (agent-telegrapher) because of arduous nature of work and conflict with State labor laws. Court held that sexual characteristics, rather than characteristics that might correlate with a particular sex, must be the basis for sustaining a BFOQ exemption.

"Same Sex" Privacy and Safety BFOQ

Dothard v. Rawlinson (1977) 433 U.S. 321, 334. Female denied assignment as a prison guard in "contact positions" in Alabama's maximum security institutions. Though the BFOQ exception is meant to be an "extremely narrow" exception to the general prohibition of sex discrimination, the Supreme Court upheld Alabama's BFOQ. BFOQ accepted due to particularly dangerous environment created by violent inmates and sex offenders; female guard's ability to maintain prison security was reduced by her "womanhood."

Gunther v. Iowa State Men's Reformatory (D. Iowa 1979) 462 F.Supp. 1087, aff'd (8th Cir. 1979) 612 F.2d 1079, cert. den. (1980) 446 U.S. 966. Refusal to hire female guards at medium security prison due to privacy concerns. Court declined to permit BFOQ, holding that reasonable accommodation could be reached between interests of inmate privacy and equal employment opportunity.

"Customer Preference" BFOQ

Diaz v. Pan American World Airways, Inc. (D. Fla. 1970) 311 F.Supp. 559 (5th Cir. 1971) 442 F.2d 385, cert. den. (1971) 404 U.S. 950. Employer excluded men from stewardess position premised on customer preference and lowered ability of males to reduce passenger stress. Court found a "business convenience" standard unacceptable for sustaining BFOQ; instead, employer required to demonstrate business necessity.